

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000298-MR

CHRISTINE GOSS

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
ACTION NO. 09-CR-00186

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING
AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Christine Goss appeals from the Laurel Circuit Court judgment of conviction on two counts of identity theft. We reverse and remand.

On June 19, 2009, a Laurel County grand jury indicted Goss for three counts of theft of identity and one count of being a persistent felony offender in the

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

second degree. At trial, Calvin Collier, a Save-U-More Supermarket employee, testified that Goss was employed by his company from December 12, 2006, until January 19, 2008, and then produced Goss's W-2 form from Save-U-More for 2007. Goss's W-2 form contained her name, social security number, date of birth, and provided that she earned \$10,371.27 in wages from Save-U-More in 2007. The form further showed a \$270.04 tax withholding by the state for income taxes.

Syretta Garrison, Goss's daughter, testified that she was incarcerated from March 2008 until September 2008. She further testified that she and her husband John Clancy filed a joint 2007 Kentucky tax return in October 2008. She testified that the Kentucky Department of Revenue sent her a letter providing that her October 2008 tax filing failed to report \$10,300 in income from Save-U-More, a \$1,242 student loan interest deduction, and a \$270 tax refund, which amounts had been reported on a prior 2007 electronic tax return filing.

Syretta then testified that she believed her mother, who worked for Save-U-More, filed the prior 2007 tax return. Syretta testified that she requested and obtained copies of all of her 2007 tax records. She testified that these copies revealed that a prior electronic filing for her 2007 Kentucky tax return was filed using her name and social security number and claimed a tax refund of \$270 and used a student loan interest deduction. She testified that her mother's former address was used as the residential address on the 2007 tax form.

Ann Roe, an employee of Kentucky Department of Revenue, testified that there were two income tax filings involving Syretta for tax year 2007, an

electronically filed tax return and Clancy and Syretta's joint tax filing. She testified that both tax filings used Syretta's name and social security number.

Roe testified that the employer identification number on Goss's W-2 was the same as the employer identification number on the electronic tax filing, which she believed was filed in March 2008. Roe then testified that the mailing address on the electronic tax filing was 2118 Highway 490, Apartment 4, East Bernstadt, Kentucky, which was Goss's former residence.

Vance Garrison, Goss's former husband, testified that credit card companies began contacting him in late 2007 about credit accounts. He testified that these accounts were not his but had been opened in his name. He further testified that he believed Goss knew sufficient personal information about him to permit her to open the credit accounts. He then testified that he received checks for a Washington Mutual account opened in his name in his post office box in East Bernstadt, Kentucky. He testified that these checks were addressed to him at 2118 Highway 490, Apartment 9, East Bernstadt, Kentucky. He testified that the checks were placed in his post office box instead of the 2118 Highway address because a postal employee recognized his name and placed his mail in his post office box.

George Gray, the owner of the apartments located at 2118 Highway 490 in East Bernstadt, Kentucky, testified that Goss twice rented an apartment at this location. Specifically, Gray testified that Goss rented Apartment No. 9 in 2004 for nine or ten months and rented Apartment No. 4 for four months starting in

March 2007. After the Commonwealth rested, Goss moved for a directed verdict of acquittal which was denied.

Goss then testified that she believed that her daughter and former husband were making the allegations because Goss was appointed the *de facto* guardian of Syretta's child. She denied the allegations but agreed that the credit card application in Vance's name listed her old address and telephone number. After Goss rested, she renewed her motion for a directed verdict, and the trial court dismissed one of the three counts based on the Commonwealth's concession on the insufficiency of evidence on one of the two counts regarding Syretta.

Following deliberations, the jury found Goss guilty on the two remaining counts. Goss and the Commonwealth then reached a sentencing agreement wherein she pled guilty to being a second-degree persistent felony offender and accepted a sentence of seven-years' imprisonment.

Goss contends that the trial court erred by denying her motion for a directed verdict of acquittal regarding the theft of Vance Garrison's identity. She contends that the Commonwealth did not prove her theft of Vance's identity by establishing each element of the charged crime beyond a reasonable doubt.

Our review of a trial court's denial of a motion for directed verdict of acquittal is governed by the standard stated in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky.1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient

to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Id. at 187.

Having stated our standard of review, we further observe that a defendant must adequately preserve an insufficiency of evidence claim by stating the specific grounds for the motion in the trial court. *Potts v. Commonwealth*, 172 S.W.3d 345, 348 (Ky. 2005). A defendant's motion must contain the specific grounds relied upon and should identify which elements of the alleged crime the prosecution has failed to prove. *Commonwealth v. Jones*, 283 S.W.3d 665, 669 (Ky. 2009). However, “[m]erely moving summarily for a directed verdict or making a general assertion of insufficient evidence is not enough.” *Id.* When an error is unpreserved, we can only review for substantial error under RCr 10.26.² *Pate v. Commonwealth*, 134 S.W.3d 593, 598 (Ky. 2004).

In this case, Goss did not specify what charge or what element of the charge the Commonwealth failed to prove beyond a reasonable doubt. She merely made a general assertion that there was insufficient evidence to support a

² Kentucky Rules of Criminal Procedure (RCr).

conviction. Therefore, we conclude that Goss's objection was not sufficient to preserve her issue, and our review will be limited to palpable error analysis.

Under RCr 10.26, an appellate court may review for palpable error, which affects the substantial rights of a defendant even when the error was not preserved by a proper objection. *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009). To be palpable, an error must be so easily perceptible and obvious that a "manifest injustice" would result if relief is not granted. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). Palpable error can only exist if there is a substantial possibility that the defendant's case would have been different absent the error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

KRS 514.160(1) provides the following:

A person is guilty of the theft of the identity of another when he or she knowingly possesses or uses any current or former identifying information of the other person or family member or ancestor of the other person, such as that person's or family member's or ancestor's name, address, telephone number, electronic mail address, Social Security number, driver's license number, birth date, personal identification number or code, and any other information which could be used to identify the person, including unique biometric data, with the intent to represent that he or she is the other person for the purpose of:

- (a) Depriving the other person of property;
- (b) Obtaining benefits or property to which he or she would otherwise not be entitled; [and]
- (c) Making financial or credit transactions using the other person's identity[.]

In order to convict a defendant of identity theft under KRS 514.160(1)(b) or (c), the Commonwealth must prove beyond a reasonable doubt that the defendant knowingly used another person's identifying information with the intent to represent herself as that other person in order to obtain property to which she was not entitled or to make financial or credit transactions. *Crouch v. Commonwealth*, 323 S.W.3d 668, 673 (Ky. 2010).

After reviewing the record, we conclude that Goss's conviction for identity theft relating to Vance Garrison constitutes palpable error. While there was evidence establishing that Goss conceivably could have committed this crime, there was a complete lack of proof directly linking Goss to the credit applications. The entire proof consisted of Vance's testimony that Goss might have known his social security number and other personal information and that the credit cards were addressed to Goss's former residence. Although circumstantial evidence can support a conviction, the evidence must amount to more than conjecture and speculation, which cannot support a criminal conviction. *Hibbard v. Commonwealth*, 291 S.W.2d 574, 577 (Ky. 1956). Here, Goss's conviction was based on conjecture and speculation and must be reversed.

After reviewing the record, we additionally conclude that Goss's conviction for identity theft relating to Syretta Garrison constitutes palpable error. While Goss had an opportunity to commit the charged crime, there is not a scintilla of evidence directly linking Goss to the filing of the 2007 tax return. The proof consisted of the fact that Goss formerly resided at an address where tax documents

were addressed, and that some of her personal identifiers were used with her daughter's on tax filings. These facts do not remotely rise to a sufficient quantum of evidence to support Goss's criminal conviction. Thus, Goss's conviction, which was based on mere supposition, must be reversed.

We finally observe that the lack of evidence to support Goss's two convictions in this case is compounded by what evidence remains unknown. Various individuals appeared to have access to the same information as Goss, but no effort appears to have been made to go beyond the speculative assertion of Goss's culpability. The Commonwealth neither subpoenaed the credit card records nor traced the 2007 tax refund proceeds allegedly received by Goss. Although direct evidence is not necessarily required to sustain an identity theft conviction, evidence based solely on the suspicion of a person's guilt will be insufficient. *Thompson v. Commonwealth*, 479 S.W.2d 583, 585 (Ky. 1972).

For the foregoing reasons, the judgment of conviction of the Laurel Circuit Court is reversed and remanded for dismissal of the two identity theft charges and for any other proceeding consistent with this opinion.

ALL CONCUR.

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